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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS VALENCIA,

Defendant and Appellant.

C042778

(Super. Ct. No. SF081879A)

Defendant Luis Valencia entered a negotiated plea of no contest to forcible oral copulation involving victim Claudia Doe and lewd acts upon Cynthia Doe. In exchange, counts of forcible sodomy, rape, unlawful sexual intercourse, dissuading a witness, failing to register as a sex offender, and failing to update registration annually were dismissed along with three prior serious felony allegations and two strike allegations. As part of the agreement, defendant was sentenced pursuant to the one

strike law to state prison for two concurrent terms of 15 years to life. (Pen. Code, § 667.61, subds. (b), (e)(5).¹)

On appeal, defendant contends he must be resentenced to a lesser determinate term pursuant to section 1170.1 because the trial court did not obtain his admission of a one-strike allegation when he entered his pleas.² We shall affirm the judgment.

FACTS

Defendant contends the trial court committed jurisdictional sentencing error by imposing a one-strike sentence even though he did not admit the one-strike circumstance as part of his plea. (§ 667.61, subd. (i).)³

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant claims in the alternative that he must be permitted to withdraw his plea. However, his failure to obtain a certificate of probable cause prevents him from attacking the plea by seeking its withdrawal. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

The People claim defendant's failure to obtain a certificate of probable cause also bars his request to be sentenced pursuant to section 1170.1. However, defendant's request is not based upon a challenge to his plea. Rather, it is based upon his claim that his plea, as taken by the trial court, did not include any admission of facts that would bring the case within section 667.61, subdivision (e)(5), as is required by section 667.61, subdivision (j).

³ Section 667.61 provides in relevant part: "(b) [a] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life

The People respond that defendant, after having gained the benefit of his plea agreement, cannot now prevail on his claim that the one strike law does not apply. We agree with the People.

At the outset of the August 6, 2002, change of plea hearing, defendant's trial counsel stated that he had received the prosecution's offer to amend the information's prior-conviction allegations in a manner "that would allow the sentence to be 15-years-to-life." The trial court noted that, if convicted by a jury, defendant faced a potential prison term of "over 150-years-to-life." After speaking with members of his family, defendant accepted the prosecutor's plea agreement. The

and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

"(c) This section shall apply to any of the following offenses: [¶] . . . [¶] (5) A violation of subdivision (a) of Section 289. [¶] . . . [¶] (7) A violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066.

"[¶] . . . [¶]

"(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.

"[¶] . . . [¶]

"(i) For the penalties provided in this section to apply, the existence of any fact required under subdivision . . . (e) shall be alleged in the accusatory pleading and either *admitted by the defendant in open court* or found to be true by the trier of fact." (Italics added.)

court and counsel next agreed on the counts to which the defendant would plead. Then the court clarified that defendant would admit a section 667.61 allegation. The court amended the information on its face by striking a section 667.71 allegation and adding a section 667.61 allegation.

Following a bench conference, defendant's trial counsel stated, defendant "would be pleading to the two -- no contest to the two multiple victims that would . . . give rise to the 15-to-life, and there would be no need to admit any priors." The court then asked if defendant would be pleading under section 667.61, subdivision (c)(5). Defendant's counsel replied, "Yes, that's fine." Shortly thereafter this colloquy took place:

"THE COURT: [Defendant], did you hear what your lawyer has had to say here today?

"THE DEFENDANT: Yes, I did, sir.

"THE COURT: Is it true you wish to enter a plea on these terms and conditions?

"THE DEFENDANT: Yes, I do, sir.

"THE COURT: Do you understand that you will be sentenced to state prison for a period of 15 years to life, do you understand that, sir?

"THE DEFENDANT: Yes, and it's with the possibility of parole, right?

"THE COURT: It's with that possibility. That's correct."

The trial court explained defendant's constitutional rights and defendant waived his rights. Defendant then pled as follows:

"THE COURT: [Defendant], what is your plea to Count Three of the People's Information, a felony violation, Penal Code section 288a(c), forcible oral copulation?

"THE DEFENDANT: No contest.

"THE COURT: What is your plea, sir, to Count Five of the Information, a felony violation, Penal Code section 288(a), lewd acts upon a child?

"THE DEFENDANT: No contest."

The trial court accepted the pleas and inquired about the remaining counts and enhancements. This exchange followed:

"[THE PROSECUTOR]: People move to dismiss, in the interests of justice in light of the pleas.

"THE COURT: And all enhancements -- all the remaining enhancements stricken.

"[THE PROSECUTOR]: All enhancements and priors, Your Honor.

"THE COURT: Remaining counts are dismissed, [defendant], and all enhancements are stricken. [¶] Do you understand, sir?

"THE DEFENDANT: Yes, I do."

In September 2002, defendant filed a motion to withdraw his plea. Following a hearing, the motion was denied.

DISCUSSION

I

Failure to Obtain Admission

Section 667.61, subdivision (i), provides that in order "[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision . . . (e) shall

be alleged in the accusatory pleading and either *admitted by the defendant in open court* or found to be true by the trier of fact.” (Italics added; see fn. 2, *ante*.)

Defendant correctly contends that the trial court erred in that he did not “admit[] . . . in open court” as part of his plea that he was being “convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim,” within the meaning of section 667.61, subdivisions (e)(5) and (i). However, this omission does not entitle defendant to any relief.

“ “[D]efendants who have received the benefit of their bargain should not be allowed to ‘trifle with the courts’ by attempting to better the bargain through the appellate process. [Citation.]” (*People v. Cepeda* (1996) 49 Cal.App.4th 1235, 1239, disapproved on other grounds in *People v. Mendez* (1999) 19 Cal.4th 1084, 1098; see *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123; *People v. Beebe* (1989) 216 Cal.App.3d 927, 932-933, 935; *People v. Ellis* (1987) 195 Cal.App.3d 334, 343, disapproved on other grounds in *People v. Guzman* (1991) 226 Cal.App.3d 1060, 1066, fn. 4.)” (*People v. Flood* (2003) 108 Cal.App.4th 504, 508; cf. *People v. Hester* (2000) 22 Cal.4th 290, 295.)

Here, faced with the prospect of a sentence of 150 years to life that would virtually guarantee he would die in prison, defendant entered a negotiated plea for a stipulated sentence of 15 years to life that would leave open the real possibility of parole before his death.

The record makes it abundantly clear that as part of the negotiated plea, defendant intended to plead no contest to an allegation that, by virtue of his prior convictions for sex offenses, he is a habitual sex offender within the meaning of section 667.61, subdivisions (b) and (c)(5), thus requiring a sentence of life without eligibility for release on parole for 15 years. Indeed, defense counsel informed the trial court that defendant "would be pleading . . . no contest to the two [counts] that . . . would give rise to the 15-to-life [term]." When the court asked whether "that would be under Penal Code section 667.61[, subdivision] (c)(5)," defense counsel replied, "Yes, that's fine." At this point, the prosecutor amended the information "to allege the enhancement under Penal Code section 667.61[, subdivision] (c)(5), . . ."

The following colloquy then occurred: "THE COURT: [defendant], did you hear what your lawyer has had to say here today? [¶] THE DEFENDANT: Yes, I did, sir. [¶] THE COURT: Is it true you wish to enter a plea on these terms and conditions? [¶] THE DEFENDANT: Yes, I do, sir. [¶] THE COURT: Do you understand that you will be sentenced to state prison for a period of 15 years to life, do you understand that, sir? [¶] THE DEFENDANT: Yes, and it's with the possibility of parole, right? [¶] THE COURT: It's with that possibility. That's correct."

Although the trial court neglected to elicit a specific plea from defendant on the enhancement pursuant to section 667.61, subdivision (c)(5), defendant already had personally stated on the

record that he wanted to enter a plea on the terms and conditions set forth by his counsel, which included pleading no contest to the enhancement. In a practical sense, defendant's statement was an expression of his admission of the section 667.61 enhancement. Now on appeal, defendant trifles with the courts by touting form over substance. Having received the benefit of his bargain, he is estopped from trying to use the appellate process to better his bargain. (*People v. Flood, supra*, 108 Cal.App.4th at p. 508; cf. *People v. Beebe, supra*, 216 Cal.App.3d at p. 932.)

Our conclusion should not be taken as an invitation to laxity during change-of-plea proceedings. Trial courts must use the utmost care when advising of, and obtaining waivers of, constitutional rights; when advising of the direct consequences of pleas; and when taking pleas and admissions of special allegations.

Moreover, prosecutors and defense counsel alike must carefully observe the plea colloquy and be ever vigilant for misstatements or omissions such as occurred here. When the trial court inadvertently failed to obtain defendant's admission of the section 667.61 allegation, neither counsel objected nor brought the omission to the court's attention. Had counsel done so, it could have been corrected in short order and the devotion of scarce appellate resources to this issue would not have been necessary.

II

Correction of Abstract of Judgment

Our review of the record discloses that the abstract of judgment must be corrected to list count 3 as violation of section 288a, subdivision (c)(2), forcible oral copulation, not a violation of section 288a, subdivision (c)(1).

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment and to forward a certified copy to the Department of Corrections.

ROBIE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.